In the Supreme Court of the State of California

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS, **Petitioner,** **v.** **SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,** **Respondent.**	Case No. S243855

Second Appellate District, Division Eight, Case No. B280676
Los Angeles County Superior Court, Case No. BS166063
The Honorable James C. Chalfant, Judge

SUPPLEMENTAL BRIEF OF THE ATTORNEY GENERAL AS *AMICUS CURIAE*

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The Attorney General respectfully submits this brief in response to the Court's January 2, 2019 order inviting supplemental briefing addressing the enactment of Senate Bill 1421.

SB 1421 amends Penal Code section 832.7, at issue in this case, to provide that certain officer personnel records concerning officer use of force resulting in death or great bodily injury, officer discharge of a firearm, or sustained findings of certain serious misconduct such as sexual assault generally are not confidential and must be made available to the public under the Public Records Act. The new law does not directly address the question presented in this case, which involves the disclosure of officer names to prosecutors to facilitate compliance with *Brady v. Maryland* (1963) 373 U.S. 83 and similar cases. It does reflect, however, a clear legislative recognition that, under certain circumstances, important public interests may warrant the disclosure of even otherwise sensitive personnel information. SB 1421 also makes clear that, as to at least those officers whose personnel files contain records covered by the new enactment, state law does not prohibit law enforcement agencies from communicating those officers' names to prosecutors to enable compliance with *Brady*.

SB 1421 does not, however, resolve or moot the issue presented in this case. SB 1421 applies to certain types of serious misconduct, including sustained findings of dishonesty and sexual assault; but it does not address other sorts of personnel-related information that may bear on officer credibility, competence, or bias. In addition, the plaintiffs in a number of cases now pending in the lower courts have contended that SB 1421 does not apply to records that were created, or that relate to conduct that occurred, before the law's effective date. The Attorney General disagrees with that contention; but if the courts were to adopt it, then SB 1421 would

have no effect on prosecutors' ability to comply with their federal *Brady* obligations with respect to any pre-2019 records or information.

SB 1421's mechanism for public access to some personnel records also does not lessen the need for prosecutors to be notified when an officer has potential impeachment information in his personnel file. Even if a criminal defendant may seek personnel records directly from a law enforcement agency, the categories of information subject to release under SB 1421 are narrower than what the State may have a federal constitutional duty to disclose. In addition, this Court should not adopt any rule that would recognize a defendant's right to submit a Public Records Act request in common with any member of the public, but deny prosecutors the ability to alert defendants to the existence of potential impeachment information in the possession of another member of the prosecution team. Any approach that privileged Public Records Act requests over enabling prosecutors to make the disclosures required in specific cases could not be squared with the U.S. Supreme Court's repeated urging that prosecutors take special care to ensure that their federal constitutional disclosure obligations are satisfied. As explained in the Attorney General's initial amicus brief, the Court should hold that Penal Code section 832.7 permits disclosure of officer names to state prosecutors to facilitate compliance with those obligations, regardless of the amendments made by SB 1421.

BACKGROUND

California's *Pitchess* statutes, originally enacted following this Court's decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, establish a conditional privilege for officer personnel records. Penal Code section 832.7, subdivision (a), provides that "the personnel records of peace officers and custodial officers …, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil

proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code."

Effective January 1, 2019, Senate Bill 1421 amends section 832.7 to provide that, notwithstanding that general confidentiality protection, specified "peace officer … personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act." (Stats. 2018, ch. 988, § 2 (codified at Pen. Code, § 832.7, subd. (b)(1).) The records covered by this provision include those "relating to the report, investigation, or findings of" incidents involving an officer's discharge of a firearm at a person and incidents in which an officer's use of force results in death or great bodily injury. (Pen. Code, § 832.7, subd. (b)(1)(A)(i), (ii).) The statute also applies to "[a]ny record relating to an incident in which a sustained finding was made" that a peace officer sexually assaulted a member of the public or in which a "sustained finding was made … of dishonesty by a peace officer … directly relating to" his official duties, including "any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence." (*Id.*, § 832.7, subd. (b)(1)(B)(i), (C).)

Under the amended statute, law enforcement agencies must redact disclosed records for certain purposes, including to remove personal data, to preserve the anonymity of complainants and witnesses, and where there is a specific reason to believe that disclosure would pose a significant danger to the physical safety of the officer or another person. (Pen. Code, § 832.7, subd. (b)(5)(A), (B), (D).) The statute also requires redaction to "protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct and serious use of force." (*Id.*,

§ 832.7, subd. (b)(5)(C).) Agencies may also redact records when, in a particular case, "the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information." (*Id.*, § 832.7, subd. (b)(6); see also Gov. Code, § 6254, subd. (k) [exemption from disclosure for privileged documents].) Finally, an agency may delay release of records involving the discharge of a firearm or use of force for prescribed periods while an active criminal or administrative investigation or proceeding is ongoing and when other criteria are satisfied. (Pen. Code, § 832.7, subd. (b)(7).)

The statute states that it "does not affect the discovery or disclosure" of personnel information pursuant to a noticed *Pitchess* motion. (Pen. Code, § 832.7, subd. (g).) SB 1421 likewise "does not supersede or affect" generally applicable criminal discovery processes or "the admissibility of personnel records pursuant to [section 832.7,] subdivision (a), which codifies the court decision in Pitchess v. Superior Court (1974) 11 Cal.3d 531." (Pen. Code, § 832.7, subd. (h).)

The Legislature adopted SB 1421 based on a finding that the public "has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force." (Stats. 2018, ch. 988, § 1, subd. (b).) Because peace officers "help to provide one of our state's most fundamental government services," withholding information about officer violations "undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety." (*Id.*, § 1, subds. (a), (b).)

ARGUMENT

1. SB 1421 does not directly address the question presented in this case. The issue here is whether state law permits law enforcement agencies to disclose to prosecutors, for the purpose of complying with *Brady*, an

officer's name and the fact that his personnel records contain potential impeachment information. SB 1421, on the other hand, provides for public access to certain officer personnel records for the purpose of enhancing transparency and promoting community trust in law enforcement.

SB 1421's provisions do support the conclusion that nothing in the *Pitchess* scheme prohibits law enforcement agencies from communicating to prosecutors at least the names of officers whose personnel files contain records covered by the new law. SB 1421 provides that, notwithstanding prior confidentiality protections, personnel records concerning specified incidents or concerning sustained findings of certain misconduct "shall not be confidential and shall be made available for public inspection pursuant to" the Public Records Act. (Pen. Code, § 832.7, subd. (b)(1).) This disclosure provision applies to records that reveal an officer's identity. (*Id.*, § 832.7, subd. (b)(2) [listing categories of records subject to release]; *id.*, § 832.7, subd. (b)(5)(A) [providing for redaction of personal information "other than the names and work-related information" of officers].) Thus, SB 1421 lifts prior confidentiality protections and permits the public release of certain officer names. *A fortiori*, the law also permits law enforcement agencies to provide the same names to prosecutors to satisfy *Brady*'s disclosure obligations.

SB 1421 specifies that the amendments it makes do "not supersede or affect the criminal discovery process … or the admissibility of personnel records." (Pen. Code, § 832.7, subd. (h); see also *id.*, § 832.7, subd. (g) [section "does not affect" *Pitchess* motion procedures].) The legislative history also reflects that the changes are intended "to give the general public, not a criminal defendant, access to otherwise confidential police personnel records relating to serious police misconduct in an effort to increase transparency." (Assem. Com. on Pub. Safety, Rep. on Sen. Bill 1421 (2017-2018 Reg. Sess.) June 19, 2018, p. 8.) But it would be

unreasonable to hold that state law requires law enforcement agencies to release officer personnel records to any member of the public on request and for any reason, while barring the same agencies from giving the same names to prosecutors so they can discharge their federal constitutional duties in connection with state criminal proceedings. (Cf. *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1286 ["There is little point in protecting information from disclosure in connection with criminal and civil proceedings if the same information can be obtained routinely under [the] CPRA," internal quotation marks and alterations omitted]; *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 290 [statutory construction leading to unreasonable or anomalous results should be avoided].) Any such result would be inconsistent with the Legislature's recognition in SB 1421 that, under certain circumstances, important public interests may warrant the disclosure of even otherwise sensitive personnel information.

2. Although SB 1421 thus permits the disclosure of certain officers' names, it does not resolve or moot this case. *Brady* requires the State to divulge any evidence in its possession that is potentially favorable to the defense and material to either guilt or punishment. (E.g., *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 7-8.) Evidence is material under *Brady* when "'there is a reasonable probability that, had [it] been disclosed to the defense, the result of the proceeding would have been different.'" (*Ibid.*, quoting *United States v. Bagley* (1985) 473 U.S. 667, 682.) Evidence can be material under this standard even if it significantly predates the officer's involvement in the defendant's case. (See *id.* at 12, 14-15 [recognizing *Brady* duty to disclose material impeachment information may extend to officer conduct occurring more than five years before defendant's crime].) And evidence bearing unfavorably on an officer's veracity, credibility, possible bias, or

competence all may be material depending on the facts of a particular case. (See *People v. Gaines* (2009) 46 Cal.4th 172, 184; *Milke v. Ryan* (9th Cir. 2013) 711 F.3d 998, 1006.)

SB 1421 does not address all of this potential impeachment information. As noted, SB 1421 applies to specific classes of personnel-related information, such as incidents involving the use of force resulting in death or great bodily injury and sustained findings of dishonesty or sexual assault. (Pen. Code, § 832.7, subd. (b)(1)(A)(ii), (B), (C).) The statute does not address information concerning, for example, an officer's racial bias, his personal relationship with a witness or victim, sustained findings of dishonesty unconnected to a law enforcement report or investigation, or repeated instances of substandard work performance—all of which may be disclosable under *Brady* depending on the circumstances of the case. In addition, the Los Angeles Sheriff's Department policy at issue in this case calls for disclosure of the names of officers who were found to have violated policies against family violence, accepting gifts, and harassment based on race, religion, and other characteristics. (Opn. at p. 8.) Such conduct likewise would not necessarily be covered by SB 1421.

Moreover, the plaintiffs in a number of cases now pending in the lower courts have contended that SB 1421 does not encompass personnel records that were created, or that relate to conduct that occurred, before the law took effect on January 1, 2019. The Attorney General disagrees with that contention. While this brief is not the place to offer a full analysis of the issue, SB 1421 applies to "[a]ny" record relating to certain sustained findings of misconduct. (Pen. Code, § 832.7, subd. (b)(1)(B)(i), (C).) In addition, SB 1421 was intended to increase transparency into officer use of force and incidents involving founded, serious misconduct. (Stats. 2018, ch. 988, § 1, subd. (b) [legislative finding that public has "right to know all about serious police misconduct"]; *ibid.* [withholding information about

officer misconduct "undercuts the public's faith in the legitimacy of law enforcement"]; Assem. Com. on Pub. Safety Rep., *supra*, at p. 4 [bill's purpose is "'to make sure that good officers and the public have the information they need to address and prevent abuses and to weed out the bad actors,'" quoting author's statement].) That goal could not be achieved if all records of prior conduct were excluded from the law's coverage. (See *Walnut Creek Police Officers' Assn. v. City of Walnut Creek* (Super. Ct. Contra Costa County, 2019, No. N19-0109), at p. 32, petition for writ of supersedeas filed, No. A156477 ["It makes little sense to suppose that the Legislature saw these serious problems and concerns [regarding the withholding of covered information] as applying strongly to police personnel records dating to 2019—but that it viewed the same problems and concerns as categorically inapplicable to police personnel records dating to 2018 or earlier"].) If, however, the courts were to construe SB 1421 as not applying to records or conduct pre-dating 2019, then the enactment itself would provide no access to the names of officers whose files contain pre-2019 records or information.[1]

For all of these reasons, SB 1421 does not fully resolve the broader question presented in this case. With respect to that question, and as explained in the Attorney General's principal amicus brief, the Court should hold that the *Pitchess* scheme permits law enforcement agencies to notify prosecutors when a peace officer has any potential impeachment information in his personnel records.

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[1] Because any public disclosure of personnel records would irrevocably reveal potentially protected information, the Attorney General has declined to provide pre-2019 records in response to Public Records Act requests directed to the California Department of Justice until the courts have provided greater clarity concerning the legal question of SB 1421's application to such records.

3. The Court should reach that conclusion even if SB 1421 also allows criminal defendants to obtain access to some impeachment-related information through a Public Records Act request. As explained, SB 1421 provides for disclosure of a narrower set of information than the State may have a federal constitutional duty to divulge to a defendant. Thus, even if the defense is able to obtain some personnel records by requesting them directly from a law enforcement agency, another mechanism is needed to ensure that all potentially relevant impeachment information is disclosed.

More fundamentally, it would not be sound policy to rely on Public Records Act requests to ensure that the State is satisfying its federal constitutional disclosure obligations. As discussed in the Attorney General's principal amicus brief, it is not clear that a rule shifting to the defense the entire burden for uncovering the existence of *Brady* material would pass constitutional muster. (Attorney General Br. at p. 20.) Such an approach would also be in substantial tension with the U.S. Supreme Court's repeated admonition that prosecutors act diligently to discharge their constitutionally mandated disclosure duties. (*Id.* at pp. 20-21.) This Court should not adopt any rule that relies on a defendant's ability to file Public Records Act requests, while depriving state prosecutors of basic information that they need to alert defendants to the existence of potential impeachment material held by another member of the prosecution team.

4. Finally, the Court should not remand for the Court of Appeal to consider SB 1421's effect on this case in the first instance. The issues presented—the interpretation of Penal Code section 832.7 and the State's disclosure duties under *Brady* and related cases—are purely legal. The Court's resolution of these issues will significantly affect the day-to-day operations of the entire criminal justice system. Only a timely, definitive resolution by this Court can provide the guidance needed by trial courts, prosecuting offices, law enforcement agencies, and criminal defendants

throughout the State. For the reasons explained here and in the Attorney General's principal amicus brief, the Court should hold that California's *Pitchess* statutes allow law enforcement agencies to communicate to prosecutors, for the purpose of complying with *Brady*, an officer's name and the fact that his personnel records contain potential impeachment information of any kind.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: February 20, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL BRIEF OF THE ATTORNEY GENERAL AS *AMICUS CURIAE*** contains 2,857 words as counted by the word-processing program used to prepare the brief and excluding the cover page and the other parts of the brief excluded under rule 8.520, subdivision (c)(3).

Dated: February 20, 2019

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Association for Los Angeles Deputy Sheriffs v. Superior Court**
Case No.: **S243855**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 20, 2019, at San Francisco, California.

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